IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 25, 2006

JIMMY RAY CURETON v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Knox County
No. 76692 Richard Baumgartner, Judge

No. E2005-02491-CCA-R3-PC - Filed September 14, 2006

Petitioner, Jimmy Ray Cureton, was convicted of felony murder and attempted especially aggravated robbery. The trial court reduced the attempted especially aggravated robbery conviction to attempted aggravated robbery. On appeal, this Court affirmed the conviction for felony murder, reversed the trial court's order reducing the attempted especially aggravated robbery conviction, reinstated the attempted especially aggravated robbery conviction, and remanded for a sentencing hearing on the reinstated conviction. *State v. Cureton*, 38 S.W.3d 64, 67 (Tenn. Crim. App. 2000). On remand, the trial court sentenced Petitioner to ten years for attempted especially aggravated robbery and this Court affirmed the sentence on appeal. *State v. Jimmy Ray Cureton*, No. E2001-01511-R3-CD, 2003 WL 179856, (Tenn. Crim. App., at Knoxville, Jan. 28, 2003) (no Tenn. R. App. P. 11 application filed). Petitioner subsequently filed a petition for post-conviction relief. In the present action, Petitioner appeals the trial court's denial of his petition for post-conviction relief, arguing that the trial court erred in finding that he received effective assistance of counsel. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ. joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the appellant, Jimmy Ray Cureton.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; Ta Kisha M. Fitzgerald, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The facts pertinent to Petitioner's post-conviction case are found in the following summary of facts set-forth in Petitioner's direct appeal from his convictions.

> On January 26, 1990, Windham "Bill" Frye was shot and killed outside the Corner Market & Deli in Knoxville. Frye, the owner of the Corner Market & Deli, had worked that night with two of his employees, Shawn Ferrell and Daniel Sabol. At some point during the night, the defendant and Johna Zack Massey entered the store to purchase cigarettes. After arguing with Frye over the price of the cigarettes, the defendant and Massey left the store. Ferrell and Sabol left the store shortly before 8:00 p.m., the normal closing time. At approximately 8:22 p.m., the Knox County Sheriff's Department received a call about a shooting at the store. When law enforcement officers arrived, Frye was lying near death, close to the front door of his store. The defendant and Massey were questioned after the shooting occurred, but neither was charged at that time.
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> Although the investigation of the shooting continued after 1990, no significant progress was made. After investigating officers received additional information in February 1996, the defendant was taken into custody. April Joiner, one of the defendant's co-workers at a Blount County Taco Bell in 1994, apparently saw his picture on a television news show and telephoned the Knox County Sheriff's Department regarding knowledge she had of the matter. The defendant was charged with the homicide. Because the defendant was 17 at the time of the shooting, the trial court conducted a hearing to determine whether he should be tried as a juvenile or as an adult. After considering the evidence and testimony presented, the trial court ordered that he be tried as an adult.
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> Jackie Fish, who, at the time of the shooting was a sergeant with the Knox County Sheriff's Department in charge of crime scene investigation, testified for the State. On the night of January 26, 1990, Sergeant Fish arrived at the scene of the shooting, secured the area, and collected evidence. Frye's body was lying outside the store. Fish stated that a bank bag containing $6,856.61 in cash and $22,865.75 in business checks was found by the victim's body. Above Frye's hand was a handgun loaded with four bullets and one spent casing, indicating the gun had been fired once.
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> * * *

The first officer to arrive at the scene was John Carter, a detective with the Knox County Sheriff's Department. Carter stated that he arrived at the scene of the shooting about six minutes after he received a call from his dispatcher. When he arrived, Frye was lying face down in front of the store surrounded by a group of four or five people. Carter dispersed the crowd and tried to assist Frye. Carter rolled Frye over onto his back and saw that he was having trouble breathing and was bleeding from around his throat and mouth. Next to Frye's body were a money bag and a pistol.

Brenda Canatzer, the defendant's girlfriend at the time of the shooting, testified that the defendant called her at home the day after the shooting. According to Canatzer, the defendant said he was being accused of murder, but did not do it. He told Canatzer he went to Frye's store to buy cigarettes, but did not have enough money. He told her that he left the store to go to a friend's house for more money. When he returned to the store, Frye was dead.

April Joiner, the defendant's shift manager at a Blount County Taco Bell in 1994, testified that in either August or September of 1994 she gave the defendant and Dante Carr, another Taco Bell employee, a ride home from work at 3:30 a.m. When the three arrived at the defendant's apartment, Carr and the defendant began drinking malt liquor. At some point after they arrived, the defendant asked Joiner if she remembered "the guy getting shot over in south Knoxville." The defendant then showed Joiner a scrapbook containing two articles about the shooting, as well as Frye's obituary. Several paragraphs in one article were highlighted. The highlighted portions of the article stated that two juveniles seen at the store the night of the shooting were being questioned. This scrapbook was admitted into evidence. Joiner testified she asked the defendant if he knew who did the shooting and that he replied, "I was the triggerman." Joiner stated the defendant also told her that after the shooting "they" ran behind a bar on the railroad tracks across the street from the store where "they" buried the gun and watched the scene as onlookers and sheriff's deputies arrived. Joiner testified that the defendant never named any other persons involved nor identified what kind of gun was used, but did describe the events as including someone in addition to himself.

On cross-examination, Joiner testified she had been a regular marijuana user for eight years and that she pleaded guilty to theft in 1993. Joiner described the defendant's demeanor as "nonchalant" or "bragging" when he made the statement that he was the triggerman. A few weeks after he told her about his involvement in the shooting, Joiner told her stepfather about the incident. Joiner's stepfather then told the Frye family about the defendant's statements, but, according to Joiner, the family did not take action because the defendant already had been cleared by the police. Joiner called the police and provided this information in February 1996, after a television

news program asked for information about the shooting. Joiner took no further action with regard to the shooting or the defendant's statements.

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Mike Upchurch, a detective with the Knox County Sheriff's Department when the shooting occurred, also testified as a State's witness. He participated in the initial investigation of the shooting and worked on the investigation throughout the history of the case. Upchurch and Lieutenant Larry Johnson interviewed the defendant and Massey the evening of the shooting. According to Upchurch, the defendant stated he was at the store the night of the shooting. The defendant said that he and Massey went to the store to buy cigarettes, but did not have enough money. After buying the cigarettes, the defendant and Massey left the store and went to the apartment of Massey's uncle. Someone told them that the police were looking for a yellow Gremlin automobile. They had been riding in Massey's Gremlin that night, so they decided to return to the store to find out what the police wanted. At that time, the defendant did not profess to have any knowledge as to how Frye was killed. Upchurch stated a search was conducted in the immediate area of the store, but no murder weapon was found. He stated that in 1996 after April Joiner provided law enforcement authorities with information, the Criminalistics Unit of the Knox County Sheriff's Department conducted a search across the street from the store in the area where the defendant told Joiner the gun was buried. The area had changed in the six years since the shooting, however. Several mobile homes were parked there and the parking lot had been paved.

On cross-examination, Upchurch testified that he did not know when the 1996 weapon search occurred. He stated that he did not know of any tests that were run on bloodstains near Frye's body. No hair or fiber evidence was collected at the scene of the shooting. The defendant's hands and clothes were not tested for gunpowder residue the night of the shooting. An inventory search of Massey's Gremlin revealed no shotgun or weapon of any kind. Upchurch stated that several persons other than the defendant claimed to have killed Frye. Part of his investigation involved the trial of two defendants, Johnson and Gibson, for an earlier burglary of the Corner Market & Deli. Johnson and Gibson were scheduled to go to trial February 7, 1990, for a burglary to which Frye was the only witness. Reportedly, someone offered a bribe in exchange for Frye's not recognizing the persons involved in the burglary.

* * *

Dan Stewart, a detective with the Knox County Sheriff's Department both when the shooting occurred and when the defendant was interviewed in February 1996, testified that he conducted interviews with the defendant on February 23, 24, and 25, 1996. Tape recordings of the defendant's statements were admitted into evidence and

played for the jury during Stewart's testimony. In all three statements, the defendant stated that on the night of the shooting, he and Massey had gone in Massey's car to the Corner Market & Deli to buy cigarettes for the defendant's cousin. The defendant attempted to buy the cigarettes but was a few cents short. He returned to Massey's car to look for change. In the course of searching for change, he saw a sawed-off shotgun under a pile of clothes in the back floorboard of the car. After helping the defendant look for change in the car, Massey went into the store and bought the cigarettes. The defendant's three statements have somewhat different versions of what Massey said when he returned to the car from buying the cigarettes. In the defendant's first statement, he said that Massey had told him, "F--- that old man. I'd robbed his old ass if he didn't have a gun." In his statement given the following day, the defendant remembered Massey as saying, "That old bastard is gonna pay. Me and mama is never going to go in there again . . . I ought to rob the old bastard and take a whole carton just to piss him off." In his third statement, the defendant recounted that Massey had said that "he was gonna rob the old bastard."

The three statements also presented somewhat differing versions of what occurred after Massey had made a threatening statement. In his first statement, the defendant said only that he had waited in the car while Massey "was going to these two girls' apartment." He said that this apartment was located between two and five miles from the Corner Market. While sitting in the car, the defendant heard "either a gunshot blast or a car backfiring." After additional questioning, he said that it was a "gunshot blast." Massey returned to the car about ten minutes later and said, "Well, this matter is taken care of." As they pulled out of the apartment parking lot, they heard "ambulances and police cars" and drove back to the Corner Market, stopping at the edge of the parking lot. Officers at the scene made the two get out of their car while it was searched.

In his second statement, the defendant related that Massey told him to wait in the car while he went into some apartments. Massey then picked up the pile of clothes that was in the car, and the defendant assumed that the shotgun was in the pile. After additional questioning, the defendant described the pile of clothing as a "towel or small blanket or something" and said that Massey took the towel and shotgun with him as he left the car. As the defendant sat in the car, he saw Massey go around the apartment building but not into an apartment. Massey was gone for fifteen or twenty minutes, and while he was gone, the defendant heard "a loud boom" which he assumed to be a gunshot. Massey returned to the car five to seven minutes later, saying, "All this matter is taken care of, and let's go." Massey had nothing in his hands when he came back to the car. As they pulled out of the apartment parking lot, they saw police cars and followed them back to the Corner Market & Deli, where their car was searched by law enforcement officers.

In his third statement, the defendant said that Massey pulled the car into "somebody's driveway and seen that nobody was home. There was like a dark, wooded area." This location was "not even a block" from the Corner Market & Deli. According to the defendant, Massey turned off the engine and lights and then "got out of the car and kinda cupped the stock of the gun in his left hand with the barrel going up his arm, down by his side." He told the defendant that he was "going to go rob Bill Frye." The defendant remained in the car, drinking a beer. He "heard one loud explosion and then a little-a gunshot." He told officers that he "knew that something went wrong, or something, that one of them got shot." Massey returned to the car, throwing the shotgun and a mask into the back. At some point, Massey told the defendant that "things went wrong, [that] Bill pulled a gun out on him, so he had to fire his gun or whatever so he could escape so he wouldn't get shot." With Massey driving, they went past the store "squealing tires" to Kelly Lowe's house. She was the best friend of Brenda Canatser, the defendant's girlfriend. The defendant gave the mask to Lowe and told her to "burn it." They then went to an apartment building, where Massey said that "there was two girls there that he knew and he was wanting to drop off the gun." While the defendant waited in the car, Massey got out, "wrapped up the gun in a towel," and went around the side of the building. Massey returned to the car in a few minutes and told the defendant, "Let's go back to the store so that we wouldn't look suspicious or something. Just go back and act like we're stupid or something, like we're looking around to see what happened." As they were on the corner of the parking lot at the crime scene, Massey got out of the car, while the defendant remained inside. Officers came over and questioned both of them. The defendant said that he gave a false statement because he "was scared for [his] life." He said Massey told him that "snitches can end up dead."

Based upon the defendant's statements during the interviews and April Joiner's statement about the scrapbook she had seen in 1994, Stewart obtained a search warrant for the defendant's residence. As the warrant was being executed on February 29, 1996, Stewart found the scrapbook containing the newspaper clippings regarding Frye's death.

On cross-examination, Stewart testified [he did not know of anyone who saw the defendant involved in Frye's murder,] and he knew of no one who was an eyewitness to the shooting. After Stewart's testimony, the State rested. The defense called no witnesses and rested as well.

State v. Cureton, 38 S.W.3d 64, 67-69, 70, 71-72 (Tenn. Crim. App. 2000).

This Court affirmed Petitioner's conviction for felony murder, reinstated his conviction for attempted especially aggravated robbery, and remanded for a new sentencing hearing. The trial court sentenced Defendant to ten years for the attempted especially aggravated robbery conviction, to be

served consecutively to the life sentence for his felony murder conviction. This Court affirmed the sentence on appeal. *State v. Jimmy Ray Cureton*, No. E2001-01511-R3-CD, 2003 WL 179856, at *1 -7 (Tenn. Crim. App., at Knoxville, Jan. 28, 2003) (no Tenn. R. App. P. 11 application filed).

II. Post-Conviction Hearing

At the post-conviction hearing, Petitioner testified that he was released on bond for two years following his arrest. During that time, he met with trial counsel approximately twelve times. Petitioner had no doubt that trial counsel understood the case and was well-acquainted with the facts of the case. According to Petitioner, his trial counsel never told him that the State had offered a plea bargain agreement.

Petitioner said that he did not fire the shot that killed the victim, and he never told anyone that he committed the murder. Petitioner did not testify at trial because he was "scared" and "not good around people." He and his trial counsel determined that it would be in his best interest not to testify.

Petitioner testified that trial counsel was ineffective because he failed to introduce exculpatory evidence at trial. Specifically, Petitioner described a letter from Michael Andre Johnson, in which Mr. Johnson admitted that he was the individual who committed the murder. Petitioner said if the letter had been entered into evidence, he would not have been found guilty of the murder. Petitioner also claimed that counsel was ineffective in failing to request a jury instruction on facilitation to commit felony murder and facilitation to commit especially aggravated robbery.

On cross-examination, Petitioner admitted that there was testimony at trial that three different people had confessed to committing the murder. He agreed that this testimony had the same effect that Mr. Johnson's letter would have had if it had been introduced into evidence. He said that his defense at trial was that he did not commit the crime, and the jury should not have found him guilty of any crime.

On redirect, Petitioner said that prior to obtaining a lawyer, he was interviewed by the police on numerous occasions. One of these interviews extended over a period of three days. During this interview, he never asked for a lawyer. He said that he was not under arrest but voluntarily agreed to answer the police officer's questions for three days.

Trial counsel testified that he represented Petitioner in the trial court and through both of Petitioner's appeals. He said that there was no forensic evidence linking Petitioner to the crime. Essentially, the evidence against Petitioner consisted of Petitioner's statement to April Joiner that he was the triggerman, his scrapbook detailing the crime, and his three inconsistent statements to the police. Trial counsel did not think it was proper that Petitioner was questioned for three days without an arrest. He said that he filed a motion to suppress Petitioner's statements to the police, as well as a motion to suppress his scrapbook. The trial court denied the motions following a hearing, and that denial was affirmed on appeal.

The defense introduced evidence at trial that three other individuals had confessed to the same crime that Petitioner had been charged with. The goal was to demonstrate to the jury that in addition to having confessed to the murder, these other parties also had a better motive than Petitioner for killing the victim. In Mr. Johnson's case, testimony established that he had a motive for killing the victim because he had an upcoming trial in which the victim was supposed to testify against him. The testimony also established that Mr. Johnson had written a letter in which he confessed to killing the victim. The actual letter was not admitted, however significant portions of the letter's content were admitted.

Trial counsel said that the theory of the defense was that Petitioner was not at the scene and did not commit the murder, and that there were other people who had an opportunity and a better motive to kill the victim. He said they also attacked the credibility of Ms. Joiner, highlighted the lack of evidence connecting Petitioner to the crime, and pointed out that although witnesses were at the scene in a matter of seconds, no one saw Petitioner in the area. He said that he did not ask for a jury instruction on facilitation because there was no proof in the record that would support such a request. He said that the State presented multiple theories, and he felt it was in his client's best interest to stick with one theory rather than arguing "we didn't do it, but if we did, we were only facilitating." Trial counsel did not request a change of venue because, due to the length of time since the crime, none of the jury pool had a specific memory of the event.

The post-conviction court denied the petition for post-conviction relief, finding that Petitioner had not proved by clear and convincing evidence that his trial counsel was ineffective. This appeal followed.

III. Analysis

The petitioner appeals the dismissal of his petition for post-conviction relief, arguing that the post-conviction court erred in finding that trial counsel provided effective representation. Specifically, he argues on appeal that trial counsel was deficient in failing to enter Mr. Johnson's letter into evidence and in failing to request a jury instruction on facilitation to commit felony-murder or facilitation to commit especially aggravated robbery. The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. *See* T.C.A. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. *See Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not re-weigh or reevaluate the evidence. *See Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo,* with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998).

The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo,* with a presumption of correctness given only to the post-conviction court's

findings of fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The *Strickland* standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

The post-conviction court found as follows:

> [Petitioner] specifically complains about two things. First, he complains that a letter purportedly written by a Mr. Johnson was not admitted into evidence. He admitted during his testimony that [trial counsel] was able to establish before the jury that three other people besides [Petitioner] had confessed to this crime. And during [trial counsel's] testimony, he expanded on that to explain that not only was he able to elicit testimony showing that three other people, including Mr. Johnson, had confessed but that major portions of this purported letter, which is clearly hearsay and inadmissible, came into evidence through the testimony of some of the state's witnesses.
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> So it's clear to me that there's no merit to that issue. The very thing that he complains about; that is, the letter from Mr. Johnson admitting his involvement in this crime, that evidence was presented to the jury. So I find that issue to be without merit.

> Second, [Petitioner] complains that he failed to ask for a facilitation charge at the conclusion of trial. [Trial counsel] explains that it was Mr. - - and [Petitioner] agrees that it was their defense at trial that [Petitioner] was not there; he did not commit this offense. His defense was not that he aided someone else or was somehow responsible for the conduct of somebody else, the facilitation of the crime, but that he wasn't there.
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> And, indeed, as [trial counsel] explained, he made a strategic decision, a trial decision, that he would not ask for a facilitation charge because he felt that that would lessen their ability to claim that they weren't there at the time of the crime, and he adds that the state had multiple theories which he was able to point out to the jury, and they had a single theory, which he thought was the strongest way to approach this case before the jury. I concur with [trial counsel's] decision in that regard.
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> In any event, a decision made as a matter of trial strategy is not going to be disturbed on post-conviction relief unless there's clear and convincing evidence that it was a faulty decision, and we don't judge that in 20/20 hindsight. But I think, all things considered, it was the proper decision, and it continues to be the proper decision today.
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> Those are the two issues that [Petitioner] specifically complained of. . . .I find that there are no grounds to support your petition for post-conviction relief. I believe [trial counsel] performed well above the standard that we apply in this case and the standard of legal representation in this jurisdiction, and therefore, under Strickland v. Washington and its [progeny], I do not believe that you have made out a case for post-conviction relief, and it is denied.

We conclude that there is nothing in the record to preponderate against the trial court's findings. Petitioner failed to show that trial counsel's representation fell below the required standard, and he failed to show that he was prejudiced in any way by counsel's performance. It is clear from the record that trial testimony established the pertinent information contained in the letter, including Mr. Johnson's admission to the crime. It is likewise clear that trial counsel made a strategic decision not to request a lesser included facilitation charge. We will not second guess this decision. Petitioner is not entitled to post-conviction relief.

CONCLUSION

We conclude that Petitioner has not met his burden of showing that he is entitled to post-conviction relief on the basis of ineffective assistance of counsel. Accordingly, we affirm the dismissal of the petition for post-conviction relief.

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THOMAS T. WOODALL, JUDGE